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SUPREME COURT, U. S.

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No. 260

In the

Supreme Court of the United States

October Term 1967

L. M. AMUSEMENT CORP.,
Appellant,

v.

STATE OF OHIO,
Appellee.

APPELLANT'S REPLY TO RESPONDENT'S MOTION TO DISMISS APPEAL

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PRELIMINARY STATEMENT

This reply is occasioned solely by deviations from the record engaged in by the appellee. The appellant in its original jurisdictional statement has largely anticipated the appellee's contentions in its motion to Dismiss the Appeal and will not reassert argument.

The appellee, however, has indicated aspects of the record which simply do not exist, and these should not be left uncorrected. Indeed the assumptions are typical of the assumptive, a priori, anti-intellectual and prejudicial exemptions from both prosecutory adduced actual adduction of evidence of evil intent and defensive opportunity for proof of good faith that have come to mark Ohio proceedings in the field of obscenity law.

CORRECTED STATEMENT OF FACT

On page 4 of Appellee's brief there appears the following statement: " 'Beautease Models' is another name of the film 'Artist Models,' which film was admitted into evidence in the trial of the within cause."

There is absolutely not a scintilla of evidence in the entire record to support this presumption of the prosecutor. It is merely an assumption he makes. He can afford to. In obscenity cases in Ohio the prosecution is virtually exonerated from any extrinsic proof of pandering purpose.

On page 5 of appellee's motion this bland statement is offered by the appellee, re the defense expert witness: ". . . At the conclusion of the State's case, the defense called one witness, and attempted to qualify him as an expert on the subjects of 'obscenity' or 'community standards.' He failed to qualify and stated no opinion . . ." The Court is asked to refer to page 47 to 56 of the record, for a deliberate misstatement has been made to it. The Defense offered and qualified an expert witness, *without any objection to individual qualification* by the Prosecution. Indeed on page 55 of the Record, the prosecution admitted individual qualification while objecting to any right of the defense to being an expert witness at all. This argumentative position they repeat in their memorandum in their response to Argument 2, belying their presently deliberately misleading statement to this court.

The arrant reshuffling of facts continues even into the argument. On page 12 it is stated: "It was further stipulated that Mr. Berger, as one of Petitioner's officers and employed in a managerial capacity, advertised the *showing of the film in question* by placing advertisements in a local newspaper." (Emphasis added). No such stipulation was made. It was stipulated that Mr. Berger placed an ad-

vertisement on behalf of the defendant but no admission was made that the advertisement was for the showing of the film in question. On that issue the prosecutor failed to offer any proof whatsoever, save its own assumptions to this date. So immersed is the prosecution in the Ohio concept that sexuality in and of itself constitutes prima facie proof of both obscenity and ergo pandering intent, that the simplest attributes of connective proof are and have been consistently ignored in this record. Indeed even corporate operation had to be reopened to prosecution proof following motion to dismiss. (See Record—page 34).

Respectfully submitted,

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Attorney for Appellee.